

OGC Has Reviewed

Chief, Special Procedures Branch

22 April 1948

General Counsel

Individual Accountability for Expenditures of Special Funds

1. The question concerning relief of individuals from accountability for unvouchered expenditures, raised in your memorandum of 11 March, goes to the basic principles controlling the granting and use of Government funds for which no detailed accounting is made outside the Agency. No such question is pertinent in connection with normal vouchered Government expenditures, as there the statutes and regulations must be followed strictly, and any deviation either through mistake, bad judgment, or fraud, will cause the General Accounting Office to take an exception to all or part of the expenditure.

2. The Comptroller General is the official representative of Congress to review the expenditures of the executive departments and agencies and is responsible only to Congress. His ruling on the propriety of expenditures normally is final and may be, and occasionally is, in direct contravention of decisions of the Federal courts. Neither he nor his agency, the General Accounting Office, has any direct collection power. He may only withhold any payments due from the Government, other than normal Government salaries during the period of employment, to offset against amounts he determines are due to the Government. However, an exception to a voucher implies liability both to the individual creating the obligation and to the officer who certifies the voucher. If collection from the individual is indicated, the General Accounting Office may demand payment but can enforce the demand against that individual only by reference of the case to the Department of Justice for collection through the courts.

3. The granting of unvouchered funds is a recognition by Congress that certain activities of the executive branch should not be scrutinized by GAO, their representative. The usual manner of making such a grant is to provide that the certification of the head of the agency concerned will be a sufficient voucher for the expenditures stated therein.

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The Comptroller has emphasized time and again that this places the entire responsibility on such agency head and on him alone. He may delegate administrative authority for the use and control of the funds, but he may not divest himself of responsibility. His certificate states that the expenditures set forth therein have been properly expended for authorized official activities of his agency. The Comptroller General cannot go behind this certification.

4. In theory, therefore, the Director of Central Intelligence has absolute power over the unvouchered funds available to the Agency. Since he must return each year to Congress for additional funds and must submit a detailed budget to the Bureau of the Budget and the committee of Congress, it is obvious that, if there were not complete confidence in his administration of unvouchered funds, no more would be forthcoming. His power, therefore, is limited by what is proper to support the authorized activities of the Agency.

5. In the matter of this propriety, he has, of course, great latitude, but the discretion is, like the responsibility, his alone. To avoid the impossible task of checking each expenditure, he must set general rules and standards for the purposes for which he wishes unvouchered funds expended and for the administration, control, and review of such expenditures. Once established, deviations from these standards may be made only with the Director's personal approval. It has been his stated policy that such approval is to be obtained in advance. There is no question, however, of his authority to approve an expenditure after it has been made. He has placed responsibility on his administrative officers and the Special Funds Division to see that expenditures come within his standards. Any question in their minds, they may refer to him or to this office, which, in general, acts somewhat as a Comptroller General but has merely an advisory function and no final authority to withhold payment.

6. In view of the responsibilities and administrative procedures outlined above, it is incumbent on each officer of CIA in charge of any operations to get approval in advance in accordance with the Director's regulations for any project requiring the expenditure of unvouchered funds, except where such advance approval is patently impossible. CIA Administrative Instruction 60-2 specifies that all projects involving the expenditure of funds not provided for in the

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regular budget shall be reviewed in advance by the Projects Review Committee for recommendation to the Director. Projects within SAC are not submitted in detail, and the ADSC is given wide discretion to approve specific projects from funds allocated to his office with the approval of the Director.

7. Presumably, any project initiated by you would be within the scope of your office, as set forth by the Director and the ADSC. No expenditures could be made until the project had been approved by the ADSC, and upon expenditure, your office would be required to submit accountings which would be audited in the Special Funds Division and, if proper, would be certified for payment. The payment when made would be entered on a schedule of disbursements which are periodically totaled and vouchers for the amounts involved prepared for each agent-cashier. This blanket voucher is then submitted to the Director, who signs a certificate thereon stating that payment has been made for proper purposes, the nature of which cannot be revealed for reasons of security in the national interest. This is the certification behind which SAC cannot go. By signing it, in effect, the Director assumes personal responsibility for the propriety of all expenditures stated therein.

8. As pointed out above, he may not divest himself of, or delegate, this responsibility, and the only relief for him would be a showing of fraud on the part of one of his subordinates of which he could not be expected to have knowledge. In the absence of fraud, it is our opinion that this certification administratively settles all questions of bad judgment or error resulting in actions such as the examples mentioned in your memorandum of 11 March. This is based on the theory that the Director has available enough checks so that the question of judgment or error, if it existed, would be raised. Thus, he has his auditors, certifying officers, Special Funds officer, the ADSC, the Executive for Inspection and Security, and the General Counsel's office, all with a right to question any doubtful expenditure. If a question is raised, the Director can do only two things -- he may either refuse to approve the individual's voucher and indicate that the individual should be held personally liable, or may condone and approve the expenditure, thereby assuming responsibility for whatever question there may be as to propriety of the expenditure. Once he has approved the payment, it is difficult to see how, as a practical matter, the subordinate could be held personally liable. The Comptroller General

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and the "AO" are bound by law to accept the Director's certification. The Department of Justice would have no way of obtaining jurisdiction unless a charge of fraud were referred to it.

D. A Congressional committee could conceivably question the transaction, but this point is confused by the undetermined problem of the release of documents and information in the custody of the executive branch to the legislative branch. In practice, the pertinent information would not normally be released to them, nor would they try to force it. Assuming, however, that a committee obtains the facts and questioned the judgment of a CIA employee, they cannot of themselves take action to impose liability. They could refer the matter to the Department of Justice, who would be bound, we feel, to accept the administrative determination of the head of this Agency. Even assuming that the Department of Justice took the matter to the courts for imposition of liability, there is an interesting and unresolved question of whether any court could, or would, hear the matter. Two decisions of the Supreme Court in cases arising out of employment of spies during the Civil War indicate not. In both cases, the spy claimed he had been promised more than had been paid to him. In its first holding (Totten, Administrator vs. U. S.; 92 U. S. 108, 10 April 1876), the Supreme Court stated that inasmuch as the whole transaction had its inception in secrecy in the interest of national security, "both employer and agent must have understood that the lips of the other were to be forever sealed respecting the relation of either to the matter." Therefore, "The secrecy which such contracts impose precludes any action for their enforcement."

"It may be stated as a general principle, that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law regards as confidential, and respecting which it will not allow the confidence to be violated. On this principle, suits cannot be maintained which would require a disclosure of the confidences of the confessional, or those between husband and wife, or of communications by a client to his counsel for professional advice or of a patient to his physician for a similar purpose. Much greater reason exists for the application of the principle to cases of contract for secret services with the government, as the existence of a contract of that kind is itself a fact not to be disclosed."

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In the later case (De Arnaud vs. U. S.; 151 U. S. 483, 29 January 1894), the Supreme Court apparently qualified its position on the point of jurisdiction. Since there were two other valid defenses not involving secrecy, it dismissed on those grounds rather than rule that no action could be brought. But the Court specifically said that the doctrine of the Totten case was not impugned, and if they had found it necessary to rule on the point, they would have difficulty distinguishing the two cases on De Arnaud's claim that he was a "military expert", not a "spy". Included in the opinion is a quote (p. 490) from the report of the Auditor to the Second Comptroller:

"Accounting officers have no jurisdiction to open up a settlement made by the War Department from secret service funds and determine unliquidated damages."

10. It will be noted that both of these cases are suits against the Government. Two modern holdings, however, indicate that the Supreme Court's attitude has not changed in this respect. In U. S. vs. Curtiss-Wright Export Corporation, (298 U. S. 304, 21 December 1936), the defendant was prosecuted for violating an Executive Order preventing export of arms under a joint resolution of Congress, which made disregard of such an Order a crime. The defense contended that the delegation to the President by joint resolution of discretionary power to control such exports was unconstitutional. The Court discussed at length the division of powers under the Constitution and the responsibility of the Executive Branch for Foreign Affairs. It pointed out, for the maintenance of international relations, Congress must often accord to the President a degree of discretion and freedom from statutory restriction which would not be permissible were domestic affairs alone involved. The Court stated:

"Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results."

The above case is quoted with approval in the recent case of Chicago and Southern Airlines against Waterman Steamship Corporation (68 Supreme Court 431, 9 February 1945), wherein the Court was asked to review an order of the Civil Aeronautics Board on an application to engage in overseas and foreign air transportation. The Civil Aeronautics Act authorized judicial

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review. The Court held that in spite of the blanket authorization, the courts properly limited themselves to review only certain fields. In particular, it said that where such a board as the CAS changed its orders at the direction of the President, citing as cause certain factors relating to the national welfare and other matters for which the Chief Executive has special responsibility, the Court would not review those changes. The opinion stated in part:

"The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports neither are nor ought to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information held secret. Nor can courts sit in camera in order to be taken into Executive confidences. But even if courts could require full disclosure, the very nature of Executive decisions as to foreign policy is political, not judicial \* \* \*. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry."

11. We feel that it is clearly indicated by the above four cases that the courts will not hear matters arising out of the confidential operations of the executive branch in connection with foreign intelligence. We realize that there are a certain number of ifs and buts in the above discussion, but it is our considered opinion that once the Director has assumed the responsibility, it would be, as a practical matter, impossible for any other officer or agency of the Government to impose a personal liability on an employee of CIA in the absence of fraud.

12. Aside from the straight expenditure of funds, there is, of course, the problem of responsibility for valuable equipment which may be lost as the result of a risky operation. Assume the risk was so great that the jeopardizing of equipment raised the question of bad judgment. Here again, the project would need proper approval, and upon establishment of the loss, the case would be referred to the Property Survey Board of OSO. This Board would make its findings and would recommend to the ADSO. It has been delegated authority by the Director to relieve responsible or accountable officers in his discretion.

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he refused so to relieve the employee, the latter could appeal to the Director. If cleared either by the Director or by the ADSO, under his delegated authority, we know of no way by which any outside officer or agency could go behind this administrative determination to impose pecuniary liability. There are many parallels to this situation, particularly in the Military Establishment. I am not aware of any case of liability being imposed for bad judgment alone, without fraud, when the administrative relief has been approved. In addition to security aspects, the head of any executive department is authorized to make regulations for control of property and determination as to individual fault in the event of loss or destruction (31 U. S. C. A., 89 and 92).

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